October 3, 2019

Summary of U.S. positions taken at the Intergovernmental Conference negotiating a new agreement on the conservation and sustainable use of biodiversity of areas beyond national jurisdiction (BBNJ) as of session 3, August 30, 2019

Introduction

The United States is a maritime nation and a long-time partner to many on capacity building regarding the protection and preservation of the marine environment. We are committed to exploring and understanding the ocean through marine scientific research. We work hard to conserve and sustainably manage resources in our waters and in the high seas to ensure their productivity, preserve their health, and support a stable and sustainable global economy.

The United States is participating actively in an intergovernmental conference at the United Nations negotiating a new agreement on the conservation and sustainable use of "biodiversity beyond national jurisdiction" (BBNJ). The third session of the conference took place August 19-30, 2019. The draft agreement under negotiation is designed as an implementing agreement under the Law of the Sea Convention and covers four main topics: area-based management tools, including marine protected areas; marine genetic resources, including questions on the sharing of benefits; environmental impact assessments; and capacity building and the transfer of marine technology.

The United States believes that the BBNJ agreement should result in meaningful, science-based conservation and sustainable use of BBNJ while protecting high seas freedoms and promoting marine scientific research. The agreement should enhance cooperation among regional and sectoral instruments, frameworks, and bodies without undermining or duplicating them or their mandates. The agreement must be consistent with the existing law of the sea regime, which is so important to all States. Currently, many aspects of the draft agreement do not meet these requirements.

It is imperative that the treaty text be adopted by consensus. We must not negotiate an agreement that is acceptable to many but that leaves behind others with significant interests. Achieving consensus is a challenging task, but we need all States on board if we are to create a long-lasting agreement that meets our objective of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

The draft BBNJ agreement touches on numerous topics in which the United States and its stakeholders have vital long-term interests. This paper summarizes positions taken by the U.S. delegation at the third session of the intergovernmental conference to protect these equities and to promote an agreement that supports and does not undermine the existing law of the sea regime. These positions are subject to change based on developments in the negotiations.

Area-based Management Tools, Including Marine Protected Areas

Area-based management tools (ABMTs), including marine protected areas (MPAs), are important for the sustainable management and conservation of marine ecosystems and their resources. The establishment of ABMTs, including MPAs, under the BBNJ agreement must be a collaborative process that builds and relies on global, regional, and sectoral bodies that have jurisdiction over activities in relevant areas. Any bodies established under the BBNJ agreement cannot – and should not purport to – have any oversight over any global, regional, or sectoral bodies, such as Regional Fisheries Management Organizations, the International Maritime Organization, or the International Seabed Authority. Additionally, any bodies established under the BBNJ agreement cannot – and should not purport to – prescribe management measures to be adopted by relevant global, regional, or sectoral bodies.

Definitions

In our view, the term ABMT refers to a tool through which one or more sectors or activities in a geographically defined area are managed with the aim of achieving particular conservation and sustainable use objectives. ABMTs encompass a broad range of tools, including marine spatial planning, time-area closures for fisheries, and MPAs. ABMTs should be based on the best available science and be adaptable over time.

In our view, an MPA is a geographically defined marine area within which one or more activities are managed to provide long-term protection to some or all of the resources therein. MPAs should be adaptable tools that allow for varying levels of ecosystem protection, conservation, and sustainable use – from "no take" marine reserves to zoned multiple use areas – to achieve specific management objectives based on the characteristics of each specific area.

Key Steps

Based on the definitions above, there should be two basic elements for an ABMT, including an MPA – the geographic location of the area and any management measures placed on activities in the area.

In our view, the BBNJ conference of parties could and should identify the geographic location of areas beyond national jurisdiction that require protection through the use of ABMTs, including MPAs, based on proposals from States. Such areas should be identified based on agreed criteria, using the precautionary and ecosystem approaches, and taking into account best available science and relevant traditional knowledge of indigenous peoples and local communities.

The conference of parties may also consider and recommend management measures for activities in such areas. It is critical, however, that any such management measures be adopted and implemented by the relevant global, regional, and sectoral bodies that have jurisdiction over the activities. Any other result would undermine those bodies. If relevant global, regional, or sectoral bodies do not exist, States Parties should in most cases cooperate to establish them. Submarine cables require additional consideration because a new body may not be desirable.

Proposals for Areas Requiring Protection

States should submit proposals identifying areas requiring protection to the conference of parties. Proposals should include:

- a description and geographic coordinates of the area;
- information on criteria – established in the agreement – applied in identifying the area;
- any activities taking place in the area that may threaten or impact biodiversity in the area;
- any recommended management measures for activities in the area; and
- a recommended monitoring, research, and review plan.

The agreement should include science-based criteria for identifying areas requiring protection. The criteria should be clear and reflect criteria used in other relevant processes. States should consult with relevant global, regional, and sectoral bodies and other stakeholders in the development of proposals.

Consideration, Consultation & Decision-Making on Areas Requiring Protection

A scientific and technical body should evaluate proposals for areas requiring protection using the criteria established in the agreement, and provide advice to the conference of parties.

When considering proposals, the conference of parties should consult with all relevant stakeholders, including interested States; relevant legal instruments and frameworks and relevant global, regional, and sectoral bodies; indigenous peoples and local communities with relevant traditional knowledge; the scientific community; the private sector; and civil society. Consultations should be inclusive and transparent.

Based on advice from the scientific and technical body and on consultations with all relevant stakeholders, the conference of parties should take decisions on (1) the identification of the area requiring protection and (2) any recommended management measures to be forwarded to relevant legal instruments and frameworks and relevant global, regional, and sectoral bodies for consideration, adoption, and implementation, if appropriate. These decisions by the conference of parties should be taken by consensus and made publicly available.

The process should include meetings with members of relevant global, regional, and sectoral bodies to discuss proposals. Because management measures recommended by the conference of parties must be considered, adopted, and implemented, if appropriate, by such bodies, it would benefit the process to consider and recommend measures that the members of these bodies could support.

Implementation, Monitoring, Review & Enforcement of Management Measures

The relevant legal instruments and frameworks and relevant global, regional, or sectoral bodies should be responsible for implementation, monitoring, review, and enforcement of any management measures established by those bodies in relation to areas identified by the BBNJ conference of parties as requiring protection. These bodies should be invited to report on such matters to the conference of parties.

Marine Genetic Resources

Application and Scope

In general, the United States would have preferred that the BBNJ treaty not cover regulation of marine genetic resources, including questions on the sharing of benefits. There is, however, broad support among developing countries for inclusion of this topic and the agreement will include it.

In our view, the agreement should apply solely to marine genetic resources that are collected in areas beyond national jurisdiction after entry into force of the agreement. The agreement should not include *ex situ* samples or derivatives. Including *ex situ* samples would introduce a range of complex variables, such as how materials are collected and stored, as well as how any BBNJ regime would interface with any domestic implementation of the Nagoya Protocol. Derivatives of genetic resources are not genetic resources and thus should not be covered by the agreement.

It is essential to maintain a conceptual and definitional distinction between marine genetic resources themselves and information about those resources, such as genetic sequence data. Information is not the same as material.

The agreement should not include language that would suggest that coastal States *qua* coastal States have rights beyond national jurisdiction. It also should not include language that would imply or suggest that marine genetic resources in areas beyond national jurisdiction are the common heritage of mankind.

Access

Currently, anyone can freely collect marine genetic resources in areas beyond national jurisdiction in accordance with international law. Access to marine genetic resources in areas beyond national jurisdiction should remain open and unimpeded, and should not be restricted by this agreement.

Benefit-Sharing

We can support non-monetary benefit-sharing if it stems from State Party-funded research, is voluntary, and is in line with scientific best practices, including on metadata collection and sharing. We cannot support monetary benefit-sharing.

Benefit-sharing should be linked to the collection of marine genetic resources in areas beyond national jurisdiction (i.e., collected *in situ*) after entry into force of the agreement. Such a system would avoid a track-and-trace regime for utilization of marine genetic resources, which would be expensive, burdensome, and detrimental to scientific research, including for conservation.

Examples of Benefit-Sharing
Benefits that could be shared voluntarily include samples, information and data, including genetic sequence data, as well as capacity building and the transfer of marine technology.

Samples: When collection of organisms in areas beyond national jurisdiction is funded by a State Party, such funding could come with a request for the recipient to deposit samples or resulting genetic sequence data (GSD) into publicly available repositories, as appropriate and within a reasonable period of time. In many cases, a repository will only accept a sample if it adds value to the collection. Sharing such samples and information is an important benefit and is part of scientific best practices.

Information and data: Information such as pre-cruise or pre-research information could be shared publicly when such cruises and research are funded by a State Party. For safety considerations, some information, including the location of the collection, should be released after the cruise. When GSD is obtained with funding from a State Party, such funding could be contingent upon making GSD publicly available within a reasonable period of time. The scientific norm of rapidly sharing information, including GSD, fosters international collaboration and is a form of benefit-sharing that creates other non-monetary benefits, such as voluntary capacity-building, education, and training. Information and research results should be released after a reasonable period of time, allowing for scientific publication.

Capacity Building and the Transfer of Marine Technology: Capacity building and the transfer of marine technology are important non-monetary benefits. They must be provided on a voluntary basis and on mutually agreed terms and conditions.

Using benefits
Benefits should be used to contribute to the conservation and sustainable use of biodiversity of areas beyond national jurisdiction. For example, benefits could be used to promote scientific research on marine genetic resources of areas beyond national jurisdiction. Benefits could also be used to support the efforts of indigenous peoples and local communities to conserve and sustainably use biodiversity beyond national jurisdiction.

Intellectual Property Rights

Intellectual property rights standards are provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and other treaties. This regime is well established and there is no need for any language in this agreement on intellectual property rights. We could support a provision that states explicitly that this agreement is not intended to have any effect on any rights or obligations relating to intellectual property rights set forth in other international agreements.

Monitoring

There is no need for a standalone provision on monitoring of this part. If this part were to apply to marine genetic resources that are collected *in situ* after entry into force of this agreement, there would be no need for monitoring or reporting on the utilization of marine genetic resources, because what is done with marine genetic resources after it is collected *in situ* would fall outside the scope of this agreement. Secondarily, a centralized mechanism for monitoring utilization of marine genetic resources would be prohibitively burdensome and costly.

Environmental Impact Assessments

Environmental impact assessments (EIAs) are an important tool to support sustainable management of ocean resources. The purpose of an EIA is to inform the State decision maker and the public about the potential environmental impacts of a proposed activity and reasonable alternatives before a final decision is made. The basic approach of the United States is that the EIA provisions of a BBNJ instrument should be consistent with and logically flow from article 206 of the Law of the Sea Convention, which is consistent with U.S. law.

Obligation & Threshold

As provided in article 206 of the Law of the Sea Convention, when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment.

The obligation to conduct an EIA is on States, not proponents of particular activities. Planned activities under a State's jurisdiction or control are those where the State exercises effective control over a particular activity or the State exercises jurisdiction in the form of licensing or funding a particular activity, and not simply activities conducted by a vessel flying a State's flag.

The EIA provisions of the BBNJ agreement should cover only activities that occur in areas beyond national jurisdiction.

Types of Impacts

The focus of EIAs is the natural and physical environment. Assessing social, economic, cultural, or other impacts is not generally part of an EIA. However, these impacts can and should be considered by the State in its post-EIA decision making.

EIAs should assess cumulative impacts, which refers to the incremental impact of an activity when added to the effects of other past, present, and reasonably foreseeable future activities, regardless of whether a State exercised jurisdiction or control over those other activities.

EIAs should assess transboundary impacts. Under the BBNJ agreement, transboundary impacts would be impacts extending to areas within national jurisdiction.

Process

Screening: States have the obligation to determine whether an EIA is required for activities under their jurisdiction or control. We could support development of indicative lists of activities that generally do or do not require an EIA in order to promote consistency across States Parties.

Scoping: Scoping is the first part of the EIA process. It is used to identify potential environmental impacts for analysis; alternatives for analysis; and sources of scientific information and any relevant traditional knowledge.

Assessment & Report: The EIA should include a description of the proposed activity and reasonable alternatives; a description of the marine environment likely to be affected (including reasonably foreseeable changes); consideration of reasonably foreseeable potential direct, indirect, and cumulative impacts of the proposed activity and reasonable alternatives; and consideration of mitigation and monitoring for the approved activity.

Public Notification & Comment: There should be a time-bound opportunity for stakeholders to comment during scoping and on draft EIA documents. The State must consider and respond to substantive comments. The State must develop a written decision document for public release.

Relationship to Other Instruments, Frameworks, and Bodies

An EIA for an activity in areas beyond national jurisdiction carried out under another instrument, framework, or body might fulfill EIA requirements under the BBNJ agreement if the State exercising jurisdiction or control over the activity determines that the EIA process is substantively equivalent to the BBNJ EIA process. It is not legally possible for this agreement, or any bodies set up under it, to set standards or requirements for EIAs conducted under other instruments, frameworks, or bodies.

Strategic Environmental Assessments

Strategic Environmental Assessments for plans and programs can be useful tools in identifying broad areas of environmental concern along with ways to avoid or mitigate potential harmful effects of a particular policy involving systematic and connected decisions. They may also be useful for evaluating cumulative impacts. However, the Law of the Sea Convention clearly does not require Strategic Environmental Assessments. Instead, article 206 focuses on assessing the potential impacts of specific "planned activities" under a State's jurisdiction or control.

Post EIA

Decision making is not part of the EIA process, but is done by the State taking into account the results of the EIA and other relevant factors. An EIA does not prescribe the outcome of a State's decision on whether the activity proceeds. There can be no decision making or decision-making oversight by any BBNJ body regarding activities under a State's jurisdiction or control.

An obligation to conduct an EIA does not carry with it an obligation to require or conduct monitoring of an approved activity. However, an EIA should include consideration of monitoring for the approved activity. In addition, States should be encouraged to adopt reasonable monitoring provisions to verify the findings of the EIA and to publish the results.

An obligation to conduct an EIA does not carry with it an obligation to require or conduct mitigation measures. However, an EIA should include consideration of reasonable mitigation measures for the approved activity. Mitigation may be required by other rules of international law that are applicable to the activity or domestic law of the State proposing the activity.

Capacity Building and Transfer of Marine Technology

Capacity building and transfer of marine technology are tools to promote the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. The United States already assists with building capacity of developing countries toward this end in a number of ways.

Obligation

We can support an obligation for States Parties to promote cooperation in capacity building and transfer of marine technology related to achieving the objective of the agreement.

Capacity building and transfer of marine technology under the agreement should support the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

Modalities

Capacity building must be voluntary. Transfer of marine technology must be voluntary and on mutually agreed terms and conditions.

Capacity building and transfer of marine technology must respect intellectual property rights and foster marine scientific research.

Capacity building and transfer of marine technology provisions in the agreement should result in a flexible and efficient process; should be compatible with and responsive to local, national, and regional realities and needs; and should build upon existing efforts.

Types

We could support development of a non-exhaustive, indicative list of types of capacity building and transfer of marine technology. Such a list should be periodically reviewed and updated. Therefore, such a list would be best developed as guidelines by the conference of parties.

We agree with the list of items that are considered the transfer of marine technology in the Intergovernmental Oceanographic Commission (IOC) Criteria and Guidelines on the Transfer of Marine Technology, and would support using that list as a starting point.

Monitoring and Review

We support a process where developing States Parties assess and report on their needs, priorities, and absorptive capabilities. We could not agree to any mandatory reporting by providers as this would be onerous and prohibitively expensive to track.

Cross Cutting Issues

The BBNJ agreement must be consistent with the Law of the Sea Convention.

The BBNJ agreement cannot – and should not be intended to – affect the legal status of non-Parties to the Convention or any other related agreements.

The BBNJ agreement must respect the rights and jurisdiction of coastal States over all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone.

The BBNJ agreement must be consistent with the sovereign immunity provisions of the Law of the Sea Convention.

We are open to considering a conference of parties and a scientific and technical body. The conference of parties should operate on the basis of consensus. The scientific and technical body should draw on the expertise of relevant regional and sectoral bodies, as appropriate.

We are open to considering the establishment of a clearinghouse mechanism that serves as a centralized platform to enable States Parties to have access to and share information relating to this agreement. We must ensure that it builds upon and connects with existing mechanisms to improve coordination and efficiency.

We could support assessed funding from States Parties for administration of the agreement, e.g., funding a Secretariat and meetings of treaty bodies. We could not agree to any mandatory funding for implementation, capacity building, or transfer of marine technology.

We do not support a compliance mechanism. Such a mechanism would not be a good use of time or resources.

We can support including dispute settlement provisions similar to those in the UN Fish Stocks Agreement.